No. 12,630

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CLARA-VAL PACKING COMPANY and CANNERY WAREHOUSEMEN, FOOD PROCESSORS, DRIVERS AND HELPERS, LOCAL UNION No. 679, AFL,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENTS.

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STATEMENT OF THE CASE.

The sole issue herein is the construction of the contract (Appendix B, pp. 29-31, Petitioner's Brief) between the respondents.

There are no disputed facts (R. 43) and therefore the construction of the contract is a question of law to be determined by the language of the contract uninfluenced by petitioner's findings.

Aluminum Co. v. N.L.R.B., supra, 159 F.(2d) 523 at 525.

If the contract was renewed or extended on March 1, 1948, within the meaning of Section 102 (P.B. 27) of the National Labor Relations Act (hereinafter called "Act") as amended in 1947, then petitioner's order should be enforced by decree of this Court; but if the contract was not so renewed or extended, then the petition should be dismissed.

Respondents contend that their contract was not so renewed or extended on March 1, 1948, because:

(1) The parties to the contract construed it as continuing in effect through that date and not as having been renewed or extended on that date.

(2) Contracts like that in the case at bar were not touched by the 1947 amendments to the Act.

(3) The doctrine of "automatic renewal", so-called, if applicable to this contract, is not the renewal or extension contemplated by Section 102 of the Act.

(4) The language of the contract does not permit of the construction petitioner seeks to put upon it.

I.

THE PARTIES' CONSTRUCTION OF THE CONTRACT.

It is important to keep in mind that the parties, and the sole parties to the contract are the two respondents.

It is obvious from the record that their positions are identical. Both respondents contend that their contract was not renewed or extended on March 1, 1948, that in fact nothing happened on that date and

that the contract in effect on March 2, 1948, was the same contract as was in effect on February 29, 1948, and neither a renewal nor an extension thereof.

It is elementary that the Courts will not interfere with the construction of a contract placed upon it by all the parties to it, unless such construction is unlawful or against public policy.

> "The primary rule of construction is that the court must if possible, ascertain and give effect to the mutual intention of the parties, as of the time the contract was made, so far as that may be done without contravention of legal principles, statutes, or public policy."
>
> 17 *C.J.S.* 689.

There is, or at least there was when the contract was executed prior to the 1947 amendments to the Act, no law or public policy prohibiting a permanent or indefinite contract with a maintenance-of-membership clause.

Aluminum Co. v. N.L.R.B., supra.

In fact, the law and public policy as expressed by the Act subsequent to the 1947 amendments, favored such contracts.

> "Act, Sec. 243 (d) * * * *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> "(1) serves a written notice upon the other party to the contract of the proposed termina-

> tion or modification sixty days prior to the expiration date thereof, or in the event such contract *contains no expiration date,* sixty days prior to the time it is proposed to make such termination or modification." (Emphasis ours.)

It will be noted that Section 243, Subsection (d) of the Act speaks of termination or modification and specifically refers to a contract which contains no expiration date that notice must be given sixty days prior to the time it is proposed to make a termination or modification of such a contract. It does not refer to this type of a contract as being extended or renewed, but recognizes a contract such as is expressly before this Court as being a contract containing no expiration date, and being a continuing contract until such time as the parties propose to terminate or modify such an agreement.

And the legal principle of a contract terminable only upon notice, and of permanent or indefinite duration in the absence of notice, is well recognized. Even when a contract is completely silent as to its duration, it can be terminated only upon reasonable notice.

> *Great Western Distillery Products Inc. v. J. A. Wathen Distillery Company,* 10 C. (2d) 442.

> "Where an agreement expressly stipulates that it is to continue * * * until the happening of a particular event * * * it remains in force and terminates in accordance with its terms, and not sooner."
>
> 17 *C.J.S.* 877.

II.

THE CONGRESSIONAL INTENT.

Maintenance-of-membership clauses in collective bargaining contracts are not *mala in se.*

Prior to the 1947 amendments to the Act such clauses were thought to be beneficial to the country's economy and the public good. Then the thinking changed, and such clauses are now "unfair". Conceivably the next Congress could reverse the 1947 stand and the pendulum could swing many times before the utopia of labor relations is achieved.

While it is clear that since the 1947 amendments there may not be maintenance-of-membership clauses in collective bargaining contracts, this is not to say that the Congress intended to invalidate contracts valid when made.

Petitioner contends that it was the Congress' intention that existing contracts should be "adjusted" to the 1947 amendments to the Act and that parties to a contract who were satisfied with it nevertheless had to change it by deleting the maintenance-of-membership clause and could not continue under the old contract "to suit their private convenience" (P.B. pp. 20-21).

In passing it may be observed that such a requirement probably would tend to defeat rather than promote the free flow of interstate commerce.

But regardless of any individual's theories, it is plain that nowhere in the 1947 amendments did the

Congress express an intent or purpose to compel the reformation of existing contracts in the foregoing respect.

It is reasonable to suppose that had the gentlemen of the Congress the intention which petitioner says they had, they would have expressed it, for there is no constitutional inhibition to its expression (the impairment of the obligation of contract being a power prohibited a state but not the United States: Art. I, Sec. 10 (1), Const.) and certainly they are capable of expressing their meaning.

But the Congress expressed no such intention and it must be presumed that its intent was not to chop off existing contracts.

The case of *Aluminum Co. v. N.L.R.B.,* supra, was decided in 1946 and of course before the 1947 amendments to the Act, and thus in contemplation of the law the amendments are to be interpreted in the light of that case when it is sought to ascertain the Congress' intent.

In the *Aluminum Co.* case the contract containing the maintenance-of-membership clause was to remain in effect for the period ending March 24, 1944, and "thereafter until modified, after at least thirty-days notice." (An addendum dated February 11, 1944, which expressly extended the date to March 24, 1945, was by its terms made a part of the original contract and therefore the case presented was as though the original contract specified 1945 instead of 1944.) In March, 1945, there was a new election and a new cer-

tification of the same union as the exclusive bargaining representative and thereafter the same parties made a new contract from May 29, 1945 to August 1, 1946 and "thereafter until modified, after at least thirty days notice". The employee was discharged on April 5, 1945. If the original contract was in effect on April 5, 1945, there was no unfair labor practice; if it were not in effect on that date, there was an unfair labor practice. In this regard the case is very similar to that at bar.

The Court held that the original contract was in effect, even though the union itself had notified the employees that its contract would expire on March 24, 1945, "because though the contracting parties were negotiating for a new agreement, neither of them had taken steps to disavow the existing contract as provided by its terms" (pp. 525-6).

Thus at the time of the 1947 amendments to the Act there was a flat Circuit Court of Appeals decision that the discharge of an employee pursuant to a contract which had passed a date on which it could have been but was not (for the parties' "private convenience") terminated or modified, was not an unfair labor practice.

It is true that there was no intervening change in public policy, but public policy does not change the law unless the policy maker uses language indicating such intention.

It is submitted with respect that the words "unless such agreement was renewed or extended" at the end

of Section 102 of the Act (P.B. 28) cannot be considered to have, in effect, "over-ruled" the *Aluminum Co.* case.

Section 103 of the Act (P.B. 28) provides that the 1947 amendments to the Act shall not affect certifications of collective bargaining representatives under the old Act for a year after certification and, in respect of such certifications, shall not affect prior contracts until the end of the contract period or one year after the amendments, whichever first occurs.

Had it been the Congress' intention to insure that maintenance-of-membership clauses would all be invalid after an adjustment period, as petitioner contends and respondents deny, it would have been very simple for the Congress to provide for such invalidation at the end of the contract period or upon subsequent renewal or extension or one year after the amendments, whichever first occurs, as was done in Section 103, or even to provide that the reaching of an anniversary date or period for giving notice of termination or modification would constitute the "cutting-off" date.

Section 102 exempts from the 1947 amendments as to unfair labor practices, acts performed pursuant to all contracts made prior to the enactment of the amendments or pursuant to contracts of not over one year if made after enactment but prior to the effective date of the amendments unless such contract was renewed or extended subsequently.

In other words, a contract made between the enacting and effective dates is exempt only for one year, but there is no such limitation on contracts made before the enacting date.

Can it be said that it was the Congress' intention to prohibit completely all maintenance-of-membership clauses after a period of adjustment, when Section 102 by its terms exempts a contract for, say, ten years? If respondents' contract by its terms was to expire on March 1, 1957, petitioner could not contend that the Congress had intended to invalidate it on March 1, 1948.

Section 8 (d) (1) of the Act shows that the Congress had in mind the existence of and recognized as valid contracts which contain no expiration date, but there is nothing in the Act to show that the Congress was even aware of what is called an "automatic renewal" clause.

Moreover, Section 8 (d) shows that it was entirely proper and consistent with the 1947 amendments for the respondents to do nothing in the notice period prior to March 1, 1948. According to petitioner, the parties to a contract must give notice of termination or modification every year whether or not they are satisfied with their contract, and the failure to give notice is ulterior, but according to Section 8 (d) and common sense, a contract is not terminated or modified unless notice is given of the desired end or change and it is not "unfair" not to desire an end or change every year.

See *Congressional Record* (Senate 6/12/47, p. 7002).

> "Duty to Bargain. Section 8 (d): The amendment to this subsection providing that the duty to bargain collectively should not be construed as requiring either party to discuss or agree to any modification of the terms of a contract if such modification is to become effective before the contract may be reopened has been construed on the floor to mean "parties will be bound by contract without an opportunity for further collective bargaining." The provision has no such effect. It merely provides that either party to a contract may refuse to change its terms or discuss such a change to take effect during the life thereof without being guilty of an unfair labor practice. Parties may meet and discuss the meaning of the terms of their contract and may agree to modifications on change of circumstances, *but it is not mandatory that they do so.*" (Emphasis ours.)

The truth of the matter appears to be that petitioner has reached its own conclusions as to what the Congress intended or should have intended by way of effectuating the new labor policies, without any support whatever from the language of the amendments and actually by straining such language to a point uncomprehended by Webster and other lexicographers.

Petitioner would have this Court rule, in effect, that, regardless of its terms and what the parties to it do or refrain from doing, no collective bargaining contract can exist unchanged for more than one year. Or, put another way, that every labor contract, again

regardless of its terms and what its parties do or don't do, must be considered as renewed every year.

Is this the way to achieve stability in "labor relations"?

III.

AUTOMATIC RENEWAL.

Each profession, trade or business has its own vocabulary. These vocabularies often contain the same words, but in many instances a particular word will have one meaning in one vocabulary and another meaning in another vocabulary. The meaning to be attributed to a word, then, depends upon who uses it and how it is used.

Perhaps no better adjective for the description of "automatic renewal" can be found than that used by petitioner, viz: "metaphysical" (P.B. 17).

Just what is the doctrine "automatic renewal" as established by the Board? It arose primarily when a group of members of the Union who were parties to the contract then in force between the employer and employees, seek to designate some other representative other than their present representative for the purposes of collective bargaining.

In the Matter of Mill B. Inc., et al., 40 N.L.R.B 346.

In that case the contract was for one year, then if either party desires to change or terminate, notice must be given within sixty days prior to the date of

termination. The contract was to continue from year to year. The Board stated, "where those confronted with a problem of weighing and resolving conflicting interests in maintaining the stability of relationships previously established by collective bargaining contracts as opposed to the right of the majority of employees to change their collective bargaining representatives at any particular time."

In the *Mill B.* case the Board frankly admitted that there were "few guides to the solution of this problem * * * the Board has frequently refused to proceed to a new determination of representatives where the petitioning union presented its claim to a majority representation after the new term of a contract automatically renewed for another year, has commenced to run. Thus the Board considered that the practice and procedure of collective bargaining, which the Act was designed to encourage, would best be effectuated if the contract was permitted to stand as a bar for the remainder of its new term."

Thus we have the Board applying a principle or rule established by the Board, namely, that a contract is permitted to run its course providing the contract has a reasonable duration in order to effectuate the procedure of collective bargaining and denies to a petitioning Union the right to break into that contract until the term of the contract has run. In that case the Board even went further and stated that a contract for the term of one year, which by virtue of an automatic renewal clause becomes a contract for two years, should be given the same effect. It is apparent

that the Board has sought to apply in reverse this doctrine or rule in order to foster a claim of unfair labor practices as against an employer and the Union, and uses this Board rule to deny the protection of the Act given to contracts made prior to the enactment of Act, (Sec. 102) and seeks to invoke this rule as against the express terms of the contract.

In applying this doctrine to the instant case before this Court, the Board has overlooked an important element which exists in representation cases and does not exist in the instant case. In a representation case, the petitioner who seeks to displace the bargaining representative, presents evidence of a majority of the employees who seek a change in their bargaining representative, following which an election is held to establish whether or not the employees of a given plant or industry desire said change. Regardless of who the Union or representative may be, the parties to the contract are the employees and an employee being a party to the contract, is a proper person to petition the Board for an election.

> "Nor do we believe that our ruling 'places a premium on inaction while penalizing unions which seek necessary changes in an agreement.' There is no more warrant for assuming that a labor organization has become inert because it does not seek changes in an agreement than for concluding that the existing contract is satisfactory. * * * It must always be remembered that labor organizations are merely the agent of the employees in an appropriate unit."
>
> *In the Matter of Mill B.,* supra.

In the instant case no party to the contract is the petitioner; the Board itself petitions for a finding that the parties to the agreement are guilty of unfair labor practices.

To a lawyer and to a legislator, a renewal or an extended contract is a different contract than its predecessor. Its substantive terms may be the same, that is, it may call for the same performances, as did the old contract, but the change in the dates between which it is in effect, makes it a new contract.

To a lay person, on the other hand, a renewed or an extended contract often is thought of as the same contract.

In the case of *Aluminum Co. v. N.L.R.B..,* supra, the question for decision was whether, at the time of the employe's discharge, there was or was not a contract in effect. The court held that there was.

In the case at bar, the question is whether, at the time of the employe's discharge, there was in effect the old or a new contract, that is, the original contract or a renewed or extended (and thus different) contract.

Such being the question in the *Aluminum Co.* case, the court held that the original contract was in effect by reason of its automatic renewal clause.

But it does not answer the question in the case at bar to say that the contract was automatically renewed on March 1, 1948, and therefore "renewed or extended" within the intendment of Section 102 of the Act.

That answer only begs the question.

To really answer the question it must be decided whether the contract in effect on June 24, 1948 (when the employe was discharged: P.B. 5) was the same or a different contract than that in effect on February 29, 1948, using the words as a lawyer would.

In other words, even if the contract was automatically renewed it was not necessarily renewed within the meaning of Section 102 of the Act even though the word "renewed" is used both in the doctrine of automatic renewal and in Section 102.

It is submitted that an "automatic" renewal is not the same as the renewal contemplated by the statute, because an automatic renewal by definition is accomplished by virtue of something in the original contract while a renewal or extension is accomplished by something done or said by one or more parties to the contract at a date subsequent to that on which the contract was made.

Having in mind that Section 102 deals with contracts of not more than a year's duration if made between the enactment and effective date of the 1947 amendments, and with contracts of unlimited duration if made before the enactment of the amendments, it is not reasonable to suppose that the renewal or extension proviso includes so-called automatic renewals, for if it does, a contract made in good faith 363 days before the enactment of the amendments which contract was construed to automatically renew rather than continue, would receive less consideration than

one made after knowledge of the enactment of the amendments.

There is no such thing as automatic renewal in ordinary contracts, except in leases.

> *Foster v. White,* 3 N.Y.S. (2d) 456 (reversed on other grounds in 17 N.E. (2d) 761 and 18 N.E. (2d) 868).

The doctrine of automatic renewal developed in N.L.R.B. cases in which, as in the *Aluminum Co.* case, the question for decision was whether or not the contract was in effect on a particular date. The doctrine should not be used to determine whether a contract had been renewed in the orthodox sense, because so to use it begs the real question and takes advantage of language used by Courts not at the time thinking of its use in that connection.

IV.

THE CONTRACT'S LANGUAGE.

The pertinent portions of the contract appear on pages 29-31 of petitioner's brief.

Section IV (a) is the maintenance-of-membership clause.

Section XV provides that the contract term shall begin on March 1, 1947 and continue without expiration until it is terminated by notice by one party to the other that the latter has violated the contract (pursuant to Section XII (a)) or by notice of a party's desire to terminate for any or no reason or be-

cause modification negotiations have bogged down (pursuant to Section XVI (b) 2).

Section XVI provides that either party desiring to modify the contract shall notify the other and if the parties have not agreed on the modifications by the anniversary date they may agree to extend the period for negotiating on the modifications or may terminate the contract, and in the absence of notice of desire to modify the contract, the contract shall remain unchanged for at least another year.

The notice of breach may be given at any time. The notice of desire to terminate for any or no reason may be given between February 16 and March 1 of the current year. The notice of desire to modify may be given between December 16 and December 31 of the current year, and the notice to terminate for inability to agree on modifications may be given on or after March 1 of the following year.

Obviously, as petitioner points out (P.B. 16), no one ever can predict with certainty that the contract will be in effect for longer than the ensuing twelve months, but the same may be said of any contract which contains no expiration date. Suppose a contract which says simply that it shall continue until one party gives the other notice of termination. It could never be predicted with certainty that such a contract would last longer than another twelve months.

Whether a contract is a continuing one or one which expires and is subject to renewal or extension, depends not upon what the parties may do but upon its terms and what the parties actually do.

Admittedly, had either respondent given notice of termination and then entered into a new contract or given notice of modifications to which the other respondent agreed, there would have been a new contract between them at the time the employe was discharged.

But no such notice was given and by its terms the contract continued. In the words of the court in the *Aluminum Co.* case, supra, neither party disavowed the existing contract and so it remained in effect as provided by its terms.

The language of the contract amounts to this: The contract "shall continue without expiration date until terminated by written notice" given at certain times before or on or after "the anniversary date".

According to petitioner's reasoning this language means that each year there must be either a renewed contract or a completely new contract!

If the parties do nothing, according to petitioner, they have renewed their contract, but if they do something, they have either modified their contract and thus gotten a new one, or they have terminated their contract and thus have none at all.

According to petitioner, a contract with an anniversary date cannot continue. It must be either renewed or terminated once every year.

According to petitioner, the absence of notice results in a renewal or extension and the presence of notice results in a termination or new (i.e., modified) contract.

Etymologically, a contract cannot be renewed or extended unless it is expiring and it cannot be expiring if it is to continue without expiration date until an event which, in the case at bar, did not happen.

Had the contract provided that silence or absence of notice would result in renewal, then it could fairly be said that the contract was renewed on March 1, 1948.

It may well be that, apart from Section 102 of the Act, the practical effect is the same, for either way there was in effect on the date of the employe's discharge a contract with the maintenance-of-membership clause. But the practical effect is very different in the two situations if viewed in the light of the statute, because if the contract was renewed rather than continued in effect, the maintenance-of-membership clause would be invalid after March 1, 1948.

But that the parties to the contract could have substituted the one language for the other, that is, could have provided either that the contract would continue in effect in the absence of notice or that the absence of notice would constitute a renewal of the contract, does not mean that there is no difference between the two.

Alternatives or substitutes are not the same thing, although they may serve the same purpose. An automobile is, or at least, was, a substitute for a horse and buggy and they are alternative means of transportation, but no one would say they are the same thing.

Petitioner's position appears to be that any language which on its face does not provide for an an-

nual renewal, is an evasion of the statute and will be construed to so provide (R. 28) "despite * * * its terms".

But there is no basis for such an accusation. The contract was made before the enacting as well as the effective dates of the amendments and both the employer and the union join in its true construction.

Nor can it fairly be said that the parties refrained from giving notice in an attempt to seek the protection of Section 102 of the Act, for the contract was modified at its 1949 anniversary.

Of course the packing and cannery business is seasonal and of course the notice periods were chosen advertently. But the mere use of the phrase "anniversary date" does not make inevitable the "automatic renewal" construction, for all the language of the contract must be read together (*Aluminum Co. v. N.L.R.B.*, supra, at 525). So reading, it is apparent that in this case the anniversary date was intended to mark the limitation on certain notice periods and not the date for automatic renewals. While the phrase "anniversary date" often is found in "automatic renewal" contracts, the two phrases are not synonymous and the presence of the one does not compel a construction which includes the implied presence of the other, especially in the face of other language to the contrary.

Petitioner concedes that there was no renewal in this case unless it was an "automatic renewal" and if it further be conceded, as it must, that there are such contracts known to the law as continuing contracts or contracts without expiration dates, contracts

which endure until they are terminated, it would be difficult indeed to choose language more appropriate than that in the contract in the case at bar, to indicate that the contract was intended to be of the non-expiring rather than of the automatic renewal type.

CONCLUSION.

The petition should be dismissed because both the language of the contract and the construction placed on it by all the parties to it, clearly show that it was intended not to be a contract subject to automatic renewal, and because the Congress did not intend to invalidate such a contract prior to its actual or real renewal and did not mean to include "automatic renewals" in Section 102 of the Act.

Therefore, the contract was not renewed or extended on March 1, 1948, within the meaning of Section 102 of the Act, and there is no legal support for the order the petition seeks to enforce by decree, because the contract continued in full force and effect and any act performed pursuant to it could not be an unfair labor practice.

Dated, San Jose, California,
December 11, 1950.

Respectfully submitted,
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